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Eminent Domain In Indiana: 1816-1865

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Notes

Eminent Domain In Indiana: 1816-1865

Forty years after the thirteen original states severed political ties with Great Britain, Indiana joined their union as the nineteenth state. Governed by the United States since the end of the Revolution and settled principally by former inhabitants of the eastern states, Indiana was not immune from the innovations and changes which American society experienced following independence. Americans became increasingly mobile, both socially and geographically. They rushed headlong into a love affair with sophisticated technology and espoused a rational and pragmatic view toward life rather than blind adherence to form and custom. In short, they believed that personal and societal goals could be rationally planned and implemented if the means were not offensive to other, more pervasive and basic values.

In Indiana, as elsewhere, one focal point for these changes was the collection of attitudes regarding private property and the extent to which such property could be subordinated to values vaguely categorized by such terms as "progress" or "the public good." Traditionally, or at least from an eighteenth-century viewpoint, absolute dominion of a property owner over his property meant that the owner could use the law to rectify any interference with the "quiet enjoyment" of his own property.[1] In other words, an owner's vested rights in his property were absolute. If a neighbor attempted to engage in activity which might harm a property owner's enjoyment of his land, the law provided a remedy by damages or injunction to the suffering property owner. Inherent in eighteenth-century property concepts, however, were tensions which became clear under stress imposed by the demands of a dynamic economy. Placing paramount value on quiet enjoyment could be interpreted in some circumstances as stifling the property rights of others who wished to use their property for more intensive economic gain. Although a "low level of economic activities" masked whatever conceptual difficulties may have been perceived at an earlier age, so that few practical conflicts resulted over the use of land,[2] this fundamental conflict became apparent at a later date. According to Morton Horwitz:

> As the spirit of economic development began to take hold of American society in the early years of the nineteenth century, however, the idea of property underwent a fundamental transformation—from a static agrarian conception entitling an

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[1] M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 31 (1977).
[2] *Id.*

> owner to undisturbed enjoyment, to a dynamic, instrumental, and more abstract view of property that emphasized the newly paramount virtues of productive use and development.[3]

To some degree a legally sanctioned interference with the right to quiet enjoyment of property had been incorporated into the law. In the colonial period, provincial legislatures authorized the taking of privately held land for the construction of highways and other transportation facilities. Laws promoting the construction of milldams and regulating fisheries also qualified the rights of owners at whose expense these laws were enacted. Thus, the origins of coercive takings were implicit in colonial government.[4] However, the scope of coercive taking in the early nineteenth century significantly expanded.

In Indiana during this time, the legislature specifically delegated power to railroad, canal and turnpike companies to condemn land held by private individuals. The state also undertook a number of internal improvement projects, including construction of the Wabash and Erie Canal in 1832 and a number of projects in 1836 under a general Internal Improvement Act.[5] Nor surprisingly, milldam builders, who were historically favored, were granted a procedure for expedited condemnation proceedings by means of a statutory writ of *ad quod damnum*.[6] For the sake of "public purposes," the state and its designated agents infringed on private property to an extent which could hardly have been imagined by earlier generations.

The important point, however, is that Americans collectively retained their sense of dedication to the law for effecting social change. To some degree it is surprising that a society which tolerated radical changes during the post-Revolutionary era remained dedicated to a system of law which drew support mainly from precedent and tradition. Yet, as the early Indiana eminent domain cases seem to indicate, adherence to precedent and tradition was reinforced by the adaptability of ancient legal forms to the demands of dynamic growth. The earliest of these cases show that the Supreme Court of Indiana was eager to validate the goals of economic growth espoused by the legislature. The court, harboring visions of the ideal modern society, supported legislation rooted in the "public interest" and the demands of "utilitarian property interests."

Yet because the judiciary never lost touch with the aspirations of new economic forces, and because it sanctioned experiments with new utilitarian property rights, it consolidated its command over the evolution of property law. Although the general policies and goals of eminent domain in Indiana were usually defined by legislators and their pro-

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[3]*Id.*

[4]Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910,* 33 J. ECON. HIST. 234 (1973) [hereinafter cited as Scheiber, *Property Law*].

[5]Act of January 27, 1836, ch. 2, 1835-36 Ind. Gen. Laws 6.

[6]Act of February 4, 1841, ch. 48, Art. V §§99-121, 1843 Ind. Rev. Stat. 944.

gressive supporters, the judiciary took responsibility for incorporating modern economic goals into the Anglo-American legal tradition. In other words, although the judiciary was a necessary partner in change, it was often an instrument of restraint and moderation.

During Indiana's first fifty years, it freely used the power of eminent domain to achieve economic growth. In a new and undeveloped state such as Indiana, it was easy for the judiciary to cooperate in the creation of a new style of property law designed to improve the state's economic future. But because the judiciary was instrumental in the development of this new style of property law, it imposed traditional formalisms which put the utilitarian aspects of this law into a legalistic perspective. The eminent domain cases of the first fifty years of the state's history reveal that the judiciary could adapt to the demands of economic growth, but that, in turn, the judiciary could channel those demands into a compatible legalistic framework.

JUDICIAL RECOGNITION OF UTILITARIAN DEMANDS

The spirit of the early nineteenth century demanded exploitation of the wealth of the continent. It disfavored property owners who did not keep their land in an optimally productive state. Quiet enjoyment of real property was not rigorously protected when it impeded the development of commerce or restricted the economically optimum use of neighboring real property. Recognition of a conflict between the abstract and incorporeal rights of the public and the physical dominion of the owners of static real property led to a greater abstraction of the owners' rights. Ownership of real property devoted to static or agrarian use became less an absolute dominion over land than a collection of rights in the land. Thus, absolute freedom from interference and the right to quiet enjoyment were regarded as accidental, rather than essential, incidents of real property ownership.

Persons claiming a right to appropriate the incidents of ownership were varied. Prominent among them were corporations chartered for the construction of railroads, canals and turnpikes; builders of milldams who flooded upstream property, interfering with fishing and water use rights; and the state, which attempted on several occasions to engage in construction projects.

The scope of the taking power exercised by any one of these groups could be broad indeed. One rather extreme example can be seen in the charter of the White Water Valley Canal Company which provided, in part, that "[t]he said company is hereby authorized to construct the [canal], with all the necessary and usual appendages and improvements, and with all things useful for the convenient and profitable enjoyment of said canal, and all hydraulic works desirable to connect therewith."[7] The Indiana Supreme Court held that the term "hydraulic works" included

[7]Act of January 20, 1842, ch. 38, §4, 1841-42 Ind. Local Laws 39.

not only grist mills, but also oil mills, carding machines and woolen factories.[8] The court also determined that under these charter terms the White Water Valley Canal Company could legitimately appropriate an acre of land adjoining its canal, and lease such property to a third party on the condition that the lessee use the land for the construction of a mill.[9] The court said, "[we] think, therefore, that the company owning the canal might be authorized by statute, to take the land mentioned in the plea as a site for said works, on account of their being of public use, proper compensation being made therefor."[10]

Entrepreneurial drive was a common characteristic among those seeking to use the power of eminent domain. The entrepreneurs contended that interference with rights residing in owners of static property served a common goal. To the extent that they obtained judicial approval of their claims they fell heir to a new type of property consisting of the rights of others. The collection of rights of the static property owner might thereby be diminished and the collection of rights of these dynamic users increased. In Indiana the process was as William E. Nelson described it for Massachusetts: "[T]he courts, sympathizing with the entrepreneurs, overturned many rules conferring property rights on initial resource users and instead legitimated a competitive ethic that favored more efficient users without regard to their priority in time."[11]

The exact nature of the rights conferred by this process was seldom discussed by the state supreme court. The early eminent domain cases never talked in terms of a transfer of fee simple title. Instead, the owner of a piece of real property seemed to lose some aspect of his dominion or control, a separable right among the collection of rights which defined his ownership. In *Hankins v. Lawrence*[12] the supreme court declared that a canal company held the plaintiff's land on a condition subsequent. If the canal company failed to fulfill the conditions of its tenure it would be deemed a trespresser *ab initio* and the plaintiff could rely on the usual common law remedies for relief. The canal company apparently did not take by purchase the fee simple title to the property, but rather a right or collection of rights subject to the subsisting claims of the individual from whom those rights were obtained.

In some cases the real property owner risked losing not his right of immediate possession to a particular piece of land, but his claims to the natural resources thereon. The Indiana Central Railway Company's charter is representative of the rights conferred upon such enterprises:

> [I]n all cases where the owner of lands, stone, wood or other materials, necessary for the use and construction of said road,

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[8]Hankins v. Lawrence, 8 Blackf. 266, 269 (1846).
[9]*Id.* at 267.
[10]*Id.* at 269.
[11]W. NELSON, AMERICANIZATION OF THE COMMON LAW 8 (1975).
[12]8 Blackf. 266 (1846).

> shall refuse to relinquish the same, or accept a fair compensation therefor, it shall be lawful for the corporation, by their agent, to enter upon, take possession of, and use the same....[13]

Sometimes the taking was minor, as when a carload of gravel was appropriated, but sometimes all rights were stripped from the owner by appropriation of the fee simple title.[14]

Implicit in the notion of new utilitarian property claims was the conviction that whatever was gained by appropriation had to be compensated. The exchange retained the flavor of a contractual arrangement, albeit one compelled by the force of the state. The doctrine of a fair exchange was written into the state's first constitution which provided in article I, section 7 "[t]hat no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor."[15] The compensation provision was retained in the constitution of 1852 with an added restriction in regard to takings by persons other than the state. Article I, section 21 provided that "[n]o man's property shall be taken by law, without just compensation; nor, except in case of the State, without compensation first assessed and tendered."[16] By these provisions the fundamental law of the state characterized eminent domain proceedings as forced, but fair, exchanges of property, and more importantly, facilitated judicial recognition of the legitimacy of new property claims while giving the judiciary a substantive basis for supervision of entrepreneurial expansion.

Although it is unlikely that, without the compensation clause, eminent domain in Indiana would have taken the form of lawful confiscation, the clause was nevertheless an important starting point for judicial assimilation of eminent domain into the general scheme of property law. Indiana and the other states were free from federal supervision in the area of eminent domain during most of the nineteenth century. In 1833 the United States Supreme Court decided that the Federal Constitution's prohibition against taking private property for public use without just compensation was not applicable to states.[17] Not until the 1848 case *West River Bridge v. Dix*[18] did the Supreme Court make a decision directly affecting state eminent powers, and not until the 1897 case *Chicago B. & O.R.R. Co. v. Chicago*[19] did the Court expressly interpret the fourteenth amendment to require state obedience to the fifth amendment's compensation clause.[20] As one commentator has said, the

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[13]Indiana Cent. Ry. v. Boden, 10 Ind. 96, 97 (1858).

[14]*Compare* Indiana Cent. Ry. v. Boden, 10 Ind. 96 (1858) *and* Crawfordsville & W. R.R. v. Wright, 5 Ind. 252 (1854), *with* Newcastle & R. R.R. v. Peru & I. R.R., 3 Ind. 464 (1852).

[15]IND. CONST. of 1816, art. I, §7.

[16]IND. CONST. of 1852, art. I, §21.

[17]Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[18]47 U.S. (6 How.) 507 (1848).

[19]166 U.S. 226 (1897).

[20]Scheiber, *Property Law, supra* note 4, at 234, 247.

Supreme Court's "role was mainly a validating one, supportive of state autonomy and tolerant of substantial diversity."[21] The development of Indiana's eminent domain law during this period was largely a matter of internal construction, and the Indiana Supreme Court's responsibility for supervision was substantial.

The state supreme court appreciated the power of the legislature in these matters. As late as 1857 it upheld the legislative grant to a town of the power to raise bonds for the purpose of purchasing stock in turnpike and railraod companies as an inducement for the construction of roads to the town.[22] The court noted that whereas "[t]he United States, and city corporations, can do only what their constitutions permit," the powers of the state are not so limited since "[a] state can do what its constitution does not, by positive provision, or reasonable implication, prohibit."[23] By virtue of the grant of power from the legislature, the municipal corporation could tax its citizens for the purpose of investment in transportation companies. The court avoided discussing the implications of unrestricted eminent domain power in the hands of the state by deciding the case on grounds of the delegated power to tax for projects of "public use" wherein the compensation to the taxpayer would consist of "the common benefit which the appropriation and expenditure of the proceeds of tax produce."[24] Further elaboration by the court on the overweening power of the state was rendered unnecessary not only by the nature of the particular case, but also because the state constitution contained a compensation clause limiting the power of the state and insuring judicial input by way of constitutional interpretation.[25]

As long as the legislature was willing to dedicate the force of law to the acquisition of new kinds of property rights, the courts were loath to interfere. As late as 1860, in *Anderson v. Kerns Draining Co.*,[26] confusion over the precise nature of these new rights led the state supreme court to conclude that even a legislative delegation of the state's taxing power could withstand attack if coupled with an otherwise permissible delegation of the eminent domain power. In *Anderson* a company had been chartered by the state in 1852 and authorized to construct levees and drains for the public good. The company duly constructed a certain drain and assessed Anderson for benefits thereby conferred upon him. Anderson refused to pay the assessment whereupon the company sued for payment and obtained judgment. In affirming the judgment the court approved the relevant statute by saying:

It authorizes property to be taken for the public use, and im-

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[21] *Id.* at 234.
[22] Aurora v. West, 9 Ind. 74 (1857).
[23] *Id.* at 82.
[24] *Id.* at 83.
[25] IND. CONST. of 1852, art. I, §21.
[26] 14 Ind. 199 (1860).

> provements to be made for the public benefit, and the assessment of taxes to pay for such property and improvements. It provides, then, for the exercise of the right of eminent domain, and of taxation for public purposes; and for such purposes these rights may be legitimately exercised.[27]

The court's decision turned upon the distinction between public and private benefit. If the improvement was only for a private benefit the defendant could apparently escape paying tax to the company. But because evidence concerning this matter was not on the record, the court presumed a public benefit. Since the tax to be assessed "was for such public use and benefit, the mode of its assessment, it seems, was unobjectionable."[28] Thus, the court allowed a company not only to exercise the power of eminent domain, but also to tax private individuals for benefits conferred. A private citizen was not only barred from enjoying his land without interference but was compelled to pay for benefits forced upon him.

Thus, it should not be assumed that the supreme court always viewed with suspicion the forces of economic expansion which threatened the security of static property interests. The compensation clause undoubtedly made the taking of private property compatiable with the judiciary's sense of justice, but this did not mean that the justices would treat this particular constitutional requirement, or any other rule of law, as a bulwark to impede the economic growth of the state. The judiciary, as much as any entrepreneurial group in society, was aware of the great potential benefits to be gained from industrial development. More than any other group, the judiciary was sensitive to the stresses which would have to be imposed on traditional legal perceptions in order to obtain those benefits. The earliest state supreme court cases reveal that the justices made little attempt to stifle what James Willard Hurst has called the nineteenth century's "release of energy."[29]

To understand why the court dedicated itself to economic expansionism one must understand some general principles which permeated the thinking of the nineteenth century. Several basic propositions of public policy which were generally accepted at this time have been identified by Hurst:[30]

> (I) Human nature is creative, and its meaning lies largely in the expression of its creative capacity; hence it is socially desirable that there be broad opportunity for the release of creative human energy. (II) Corollary to the creative competence which characterizes human nature, the meaning of life for men rests

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[27] *Id.* at 200.
[28] *Id.* at 201.
[29] J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 1-32 (1956).
[30] *Id.* at 5-6.

> also in their possessing liberty, which means basically possessing a wide practical range of options or choices as to what they do and how they are affected by circumstances. (III) These propositions have special significance for the future of mankind as they apply in the place and time of the adventure of the United States.[31]

In short, the spirit of the time was one of optimism and confidence. The spokesmen of that age were not inhibited from challenging the utility of ancient principles. Change was considered a good in itself because, given the creative and progressive nature of man, any change must of necessity tend toward the betterment of the human condition.[32] As a consequence of this outlook, the Indiana judiciary, in accord with the rest of society, "did not devote the prime energies of our legal growth to protecting those who sought the law's shelter simply for what they had; our enthusiasm ran rather to those who wanted the law's help positively to bring things about."[33]

One barrier to implementing developmental public policy goals was lack of adequate capital to finance many of the components of an industrial society. A related problem was marshalling capital assets to obtain the greatest return from their use. From these problems flowed certain legal policies which gave force to the "principle of directing capital to points where the greatest multiplier effects might be anticipated."[34] Law also became a tool for the "mobilization" of capital.[35] As Hurst said, the power of eminent domain was one weapon in the struggle for a rational promotion of capital growth in the country:

> To increase the net capital at our command, we encouraged capital imports. The most important import of foreign capital was in people. Immingrants brought cash and goods with them...[but t]he invaluable net addition to capital was in the hands, energies, and brains of the immigrants....Both nation and states sold public lands cheaply to induce immigration, and this was also one object of public subsidy of canal and railroad construction.[36]

Promotion of transportation facilities prompted an influx of people, and insured both immigrants and longtime denizens that their labor product would be more easily moved in the stream of commerce. The initial promotion of railroads, canals, turnpikes and mills was viewed as "priming the pump" for future increases of capital and commerce, with consequent benefit to society through material gain.

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[31] *Id.*
[32] *Id.* at 24.
[33] *Id.* at 10.
[34] *Id.* at 60.
[35] *Id.*
[36] *Id.*

The view of the Indiana Supreme Court that marshalling capital was a legitimate goal of eminent domain was apparent in the early case *Kepley v. Taylor*.[37] The plaintiff sued in trespass against the owner of a milldam for damages caused when water retained by the dam flooded a ford serving plaintiff's upstream property. Since territorial days, Indiana had been governed by a statute providing for a writ of *ad quod damnum* whereby the prospective builder of a milldam could have damages assessed once and for all in favor of all property owners who might be damaged by the dam.[38] The purpose of the act was to preclude a continuous succession of actions against milldam owners instituted by aggrieved property owners. The defendant in *Kepley* had properly sued out a writ of *ad quod damnum* and had apparently paid assessed damages to the plaintiff's grantor while the dam was being built. Plaintiff acquired the upstream property before the dam was finished. After completion, the dam allegedly caused greater damage to plaintiff's land than had been anticipated in the prior assessment. The court refused recovery on the following basis:

> The important advantage of mills to the inhabitants of the country in general, is too obvious to require any elucidation; but it is to be recollected that the expense of erecting a good mill, especially on a large stream, is such that few men of ordinary capital would undertake it, for the moderate profit which would accrue to the owner, added to the benefit which might result to the public, unless he could in some way be secured against the trouble of being harassed with suits at law, by persons whose property might be injured, or supposed to be injured by such an establishment.[39]

In regard to the statutes authorizing writs of *ad quod damnum*, the court was satisfied that "[t]hese statutes are supported on the ground of the benefit of such mills to the public."[40] The same justification could be extended to other statutes employing eminent domain power in the promotion of other internal improvements. The expansive spirit of the court tended to minimize the importance of vested property rights if an invasion of those rights was authorized by the legislature in the name of the public good and in furtherance of policies rooted in the perceived goals of efficient capital use. Ironically, the court demonstrated willingness to strike down vested rights when chartered corporations of the state attempted to assert the inviolability of their charter rights against subsequent action by the state legislature.[41]

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[37] 1 Blackf. 492 (1819).

[38] Statute of September 17, 1807, ch. 36, §§5, 8,12, 1807 Ind. Acts.

[39] Kepley v. Taylor, 1 Blackf. 492, 494 (1819).

[40] Hankins v. Lawrence, 8 Blackf. 266, 269 (1846).

[41] *See, e.g.*, Bank of Vincennes v. State, 1 Blackf. 267 (1823); Newcastle & R. R.R. v. Peru & I. R.R., 3 Ind. 464 (1852).

In 1823 the Bank of Vincennes, which was the state bank of Indiana, lost its franchise when the legislature became alarmed over certain alleged misconduct by the directors. The stockholders naturally disputed the state's authority to effectuate such a forefeiture.[42] The court not only upheld the state's action but dismissed the stockholder damage claims by saying, "we see nothing in the constitution to prevent the seizure of these franchises, let the effect upon private property be what it may."[43] The court held that the franchise was not a property interest immune from state interference, nor was it a right entitling the owners to compensation upon siezure. More shocking perhaps was the court's treatment of bank property other than the franchise. Upon dissolution of the corporation its property would be deemed to have no owner. Lands formerly held by the corporation would return to the grantors or their heirs, goods and chattels would escheat to the state, and all debts and credits of the corporation would be erased.[44]

In an 1852 case, the Peru and Indianapolis Railroad Company sought an injunction against the Newcastle and Richmond Railroad Company to restrain the latter from constructing its road in a manner that plaintiff contended would infringe upon its own charter rights.[45] The plaintiff corporation had been granted a charter in 1846 which provided, among other things,

> [t]hat when said corporation shall have procured the right of way, as hereinbefore provided, they shall be seized, in fee simple, of the right of such land, and they shall have the sole use and occupancy of the same...and no person, body politic or corporate, shall in any way interfere with, molest, disturb, or injure any of the rights or privileges hereby granted, or that would be caluclated to detract from or affect the profits of said corporation.[46]

The plaintiff contended that its charter conferred exclusive and vested rights arising by way of "contract on the part of the state for the exclusive possession by said company."[47]

In reversing the lower court's granting of the injunction, the court rejected plaintiff's construction of its charter, holding instead that the charter merely denominated the nature of plaintiff's holding, i.e. fee simple subject to all of the rights of its grantors and to all subsequent claims arising under eminent domain. According to the court:

> If the view taken by the counsel for the Peru and Indianapolis Railroad Company be correct, the state can not, without the

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[42]Bank of Vincennes v. State, 1 Blackf. 267 (1823).
[43]*Id.* at 279.
[44]*Id.* at 281-83.
[45]Newcastle & R. R.R. v. Peru & I. R.R. 3 Ind. 464 (1852)
[46]Act of January 19, 1846, ch. 186, §19, 1845 Ind. Local Laws 214.
[47]Newcastle & R. R.R. v. Peru & I. R.R., 3 Ind. 464, 467-68 (1852).

> consent of said company, permit the construction of a state or county highway across the track of said railroad. It would require the clearest expression to satisfy us that a legislature had attempted to commit so great a folly.[48]

The defendant company, exercising a delegated power of eminent domain, could thus construct its track across plaintiff's track subject to payment of compensation for whatever damage might be caused to the plaintiff thereby. As the court determined seven years later in another case,[49] the amount of damages recoverable by a chartered company from a subsequently chartered company would be limited to the actual value of tangible property taken by the latter. Neither company would have such a vested right that one company could sue the other for diminished business.[50]

These cases indicate a remarkable degree of judicial support for the claims of dynamic economic interests under the rubric of eminent domain and at the expense of static property interests. In essence, the supreme court gave jurisprudential life to the demands of new property claims that were inherent in the advanced socio-political philosophy of the time. The earliest cases in particular reveal a judiciary not at all hostile to implementing legislative goals of an advanced economic order. Limits to an abuse of the process written into the constitution and delegations of power made the implementation of economic schemes all the more compatible to judges who were willing to mold the law to meet new demands without distorting the law beyond all recognition. The process of internalizing an expansive law of eminent domain into the general scheme of law inevitably meant, however, that the body of eminent domain law created largely by the legislature would be clothed in a mantle woven by the judiciary.

THE JUDICIARY AND THE FORMALISM OF THE LAW

Although the Indiana Supreme Court obviously supported the goals sought through exercising eminent domain, the greatest approval was given in the earliest cases. In fact, several decades after Indiana became a state, the court seldom rationalized decisions with broad policy arguments. Instead, it articulated rules by which eminent domain cases might be decided with more certainty and balance. The court became increasingly suspicious that individual citizens required more protection against state power.[51] To a greater degree, perhaps, the court perceived its function as arbiter between competing interest groups: the state and

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[48] *Id.* at 468.

[49] Lafayette Plankroad Co. v. New Albany & S. R.R., 13 Ind. 90 (1859).

[50] *Id.* at 92.

[51] As the supreme court expressed it in 1843: "In this age of improvement, there is, perhaps, no point at which the rights of the citizen are more likely to be overlooked and invaded by the government [than in eminent domain], and consequently none where they should be more vigilantly watched, than at this." State v. Beackmo, 8 Blackf. 246, 250 (1846).

its agents on one hand, attempting to use eminent domain as a tool for the achievement of public policy goals, and individuals or corporations on the other hand, attempting to preserve their vested property rights.

The judiciary's interest was in preserving the credibility of judicial decisionmaking. A permissive attitude toward the exercise of eminent domain could easily offend traditional notions of due process. It was not difficult to imagine abuses in the exercise of eminent domain, especially when the typical case involved a poor farmer contesting the actions of a wealthy corporation. Although the legislature was ultimately responsible for the use of eminent domain, the courts remained the only public institution with sufficient authority to limit whatever tactics the exponents of eminent domain might employ. On the other hand, judges realized that if private contract was the only method of acquiring critical pieces of property, obstinate property owners could effectively impede the progress of internal improvement in the state. Economic progess had to be promoted, but not with total disregard for the legitimate claims of vested property rights.

A decade-by-decade breakdown of the cases seems to show that the Indiana Supreme Court achieved a balance between these competing interests. The chart below indicates cases decided during each decade, either in favor of the party asserting the right of eminent domain or the party whose property was threatened by an exercise of the right.[52]

Decade	Cases decided for the party exercising eminent domain power.	Cases decided for the party whose property was threatened.
1816-1825	2	0
1826-1835	0	0
1836-1845	3	6
1846-1855	15	10
1856-1865	22	14

As the chart indicates, after 1845 the Indiana Supreme Court favored eminent domain more often than not, but also deferred to claims of vested property owners.[53] To facilitate this balance the court employed doctrines which were malleable enough to allow judicial modification, suiting the demands of a particular time or the circumstances of a par-

[52]Cases are classified according to results at the supreme court level. The outcomes after remand, when a victorious party might lose upon other grounds, have not been considered. In the few cases when one party won on the substance of the law, but lost on the issue of costs, the case was classified as favorable to that party.

[53]The greatest number of eminent domain cases appear after 1845, apparently reflecting what the supreme court called the "second era of internal improvement." Eward v. Lawrenceburgh & Upper Miss. R.R., 7 Ind. 711, 713 (1856). During this time the vested rights of property owners were probably subjected to the greatest stress.

ticular case. Perhaps they were, as Harry Scheiber described them, "expediting doctrines,"[54] but they served other purposes as well.

For example, one doctrine running through many cases of this period was that owners whose property was taken should be strictly limited to statutory remedies. Corollary to that proposition was the belief that property owners should be foreclosed from traditional common law remedies such as nuisance, trespass or injunctive relief. In part, the doctrine was designed to free the takers of property from "that frequency of action"[55] to which aggrieved parties might resort under the common law. In part, it was founded on the belief that

> there was no wrongful act, in such cases, on the part of those taking the property, which could be made the subject of an action against them, as the law, valid under the...constitution, authorized them thus to act, and the only right of the individuals whose property was so taken, was to have compensation to be ascertained in the manner pointed out in the act.[56]

Nevertheless, the doctrine did not necessarily foreclose deference to claims of aggrieved property owners. In 1854 the supreme court allowed a trespass action to stand against a railroad company when the company failed to plead that it was acting under the authority of its charter.[57] Injunctive relief was allowed in another case when the defendant turnpike company threatened to take by mistake more land than it had condemned via statutory proceedings.[58] The court also granted injunctive relief to prevent a city from taking a plaintiff's land for street purposes before complying with the statutory provisions which called for an assessment and tender of damages prior to taking.[59]

In all of the cases indicated in the chart, when the exclusiveness of the statutory remedy and the preemption of common law remedies were important issues, a decision in favor of parties asserting the eminent domain power was not a foregone conclusion. Of those cases, sixteen were decided in favor of the party asserting eminent domain[60] and seven were decided in favor of the party whose property was taken.[61] This merely

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[54]Scheiber, *Property Law, supra* note 4, at 235.

[55]Kepley v. Taylor, 1 Blackf. 492, 495 (1819).

[56]Null v. White Water Valley Canal Co., 4 Ind. 431, 435 (1853).

[57]Crawfordsville & W. R.R. v. Wright, 5 Ind. 252 (1854).

[58]Sidener v. Norristown, Hope & St. Louis Turnpike Co., 23 Ind. 623 (1864).

[59]City of Lafavette v. Bush, 19 Ind. 326 (1862).

[60]Hughes v. Lake Erie & Pac. R.R., 21 Ind. 175 (1863); Indiana Cent. R.R. v. Oakes, 20 Ind. 9 (1963); Wright v. Pugh, 6 Ind. 106 (1861); City of Lafayette v. Spencer, 14 Ind. 399 (1860); McCormick v. Terre Haute & R.R.R., 9 Ind. 283 (1857); Leviston v. Junction R.R., 7 Ind. 597 (1856); New Albany & S. R.R. v. Connelly, 7 Ind. 32 (1855); Lafayette & I. R.R. v. Smith, 6 Ind. 249 (1855); McMahon v. Cincinnati & Chi. Short-Line R.R., 5 Ind. 413 (1854); Null v. White Water Valley Canal Co., 4 Ind. 431 (1853); Conwell v. Hagerstown Canal Co., 2 Ind. 588 (1851); Kimble v. White Water Valley Canal Co., 1 Ind. 285 (1848); McCormick v. Town of Lafayette, 1 Ind. 48 (1848); Peck v. Van Rensselaer, 8 Blackf. 312 (1846); Rubottom v. M'Clure, 4 Blackf. 505 (1838); Kepley v. Taylor, 1 Blackf. 492 (1819).

[61]Sidener v. Norristown, Hope & St. Louis Turnpike Co., 23 Ind. 623 (1864); City of

demonstrated that the court could develop a doctine which promoted eminent domain while limiting its application when countervailing considerations became paramount.

The flexibility of the process was even more apparent when the court addressed itself to other rules of decision. For example, on the subject of recovery for consequential injuries the court uniformly denied recovery when the defendant was a municipal corporation,[62] but allowed recovery when the defendant was a railroad company.[63] In another case, when the right to a jury trial was contested, the court upheld the right of a landowner to have his damages assessed by a jury,[64] but denied the right to a railroad which insisted that "a part of the cause" be tried by jury.[65] Finally, although the court originally gave unqualified support to the notion that a taker of property could reduce the damages by the value of benefits conferred, after a series of confusing cases it rejected the doctrine entirely.[66]

Whether the court purported to decide a case under some general doctrine or on an *ad hoc* basis, the import of the process was the same. It was a matter of implementing social policy goals of internal improvement while guarding against abuses in the exercise of eminent domain. The formality of the process was more than empty procedure. It gave the judiciary credibility in the eyes of those who advocated internal improvement because it turned their claims into actionable rights. But that very process made judicially imposed limitations on the right of eminent domain all the more authoritative and feasible. It allowed the judiciary to temper the effects of eminent domain according to the equities of the particular case.

Lafayette v. Bush, 19 Ind. 326 (1862); Lane v. Miller, 17 Ind. 58 (1861); New Albany & S. R.R. v. O'Daily, 12 Ind. 551 (1859); Crawfordsville & W. R.R. v. Wright, 5 Ind. 252 (1854); Summy v. Mulford, 5 Blackf. 202 (1839); Smith v. Olmstead, 5 Blackf. 37 (1839).

[62]City of Vincennes v. Richards, 23 Ind. 381 (1864); Macy v. City of Indianapolis, 17 Ind. 267 (1861).

[63]Indiana Cent. Ry. v. Boden, 10 Ind. 96 (1858); Protzman v. Indianapolis & C. R.R., 9 Ind. 467 (1857); Evansville & C. R.R. v. Dick, 9 Ind. 433 (1857).

[64]Lake Erie, W. & St. L. R.R. v. Heath, 9 Ind. 558 (1857).

[65]Cincinnati & Chi. R.R. v. McFarland, 22 Ind. 459 (1964).

[66]Evansville I. & C. Straight Line R.R. v. Cochran, 10 Ind. 560 (1858); Evansville, I, & C. Straight Line R.R. v. Stringer, 10 Ind. 551 (1858)(per curiam); Evansville, I. & C. Straight Line R.R. v. Fitzpatrick, 10 Ind. 120 (1858).

The judiciary's role is further illuminated by examining how cases were decided when a particular justice wrote the court's opinion. The following chart indicates that relationship.

Name of the justice and his tenure.	Number of opinions in favor of the party exercising eminent domain.	Number of opinions in favor of aggrieved property owner.
Blackford (1817-1853)	3	4
Davison (1853-1865)	3	3
Dewey (1836-1847)	2	3
Frazer (1865-1871)	1	0
Gookins (1854-1857)	3	1
Gregory (1865-1871)	0	1
Hanna (1857-1865)	3	3
Holman (1816-1842)	1	0
Perkins (1856-1865) (1877-1879)	14	6
Roache (1853-1854)	0	1
Smith (1847-1853)	5	0
Stuart (1853-1858)	1	4
Sullivan (1837-1846)	0	2
Worden (1858-1865)	2	3
Per Curiam	3	0

The chart indicates that no single justice, with the possible exception of Justice Perkins, strongly pushed the court in a particular direction in deciding eminent domain cases. But even Justice Perkins, who wrote more opinions favoring the cause of eminent domain than any other justice, wrote opinions in favor of parties opposing the exercise of eminent domain. Of the fourteen justices who served on the Indiana Supreme Court between 1816 and 1865, eight justices wrote some opinions which favored and some which disfavored the exercise of eminent domain. Only six justices wrote all of their opinions exclusively in favor of one side. Of these six justices, three wrote exclusively in favor of the exercise of eminent domain while the other three wrote exclusively in favor of the aggrieved property owner.

Of the seventy-two eminent domain cases disposed of during this period, fifty-eight were decided by justices who wrote opinions in favor of both sides. Only eleven cases were decided by justices whose opinions exclusively favored one side. These statistics show that most of the cases were decided by justices who did not automatically favor one side or the other. Moreover, among those justices who wrote all of their opinions exclusively for one side, the number of opinions is too low to infer any substantial prejudice. The statistics show that, although a majority of

forty-one cases were decided in favor of the party asserting eminent domain, the rationale which justified the use of eminent domain never became an ideology of the court. Rather, the judiciary gave form to the new substance of eminint domain law, and, as the proponents of eminent domain occasionally found, would not tolerate deviation from legal form.

CONCLUSION

The first half of the nineteenth century witnessed tremendous changes in the sociological and technological patterns of American society. Inevitably, these changes were expressed in the attitudes which Americans held toward private property. As the advocates of dynamic economic growth came into ascendancy, demands were placed upon ancient concepts of real property ownership. A utilitarian and practical approach toward economic development mandated the creation of legal means which would allow those who were most capable of meeting society's needs to utilize available resources for the optimum advancement of the "public welfare." The result was the creation of a body of eminent domain law suited to the needs of the time.

In Indiana, as elsewhere, the judiciary did not resist the trend toward new legal concepts which diminished the status of static property owners. In Indiana the judiciary was often at the forefront in advocating and legitimating the claims of utilitarian interest groups. The earliest cases show the judiciary most strongly motivated by policy arguments in the justification of eminent domain. Nevertheless, the judiciary never lost its sense of dedication to legal principles which antedated modern philosphy. It never lost sight of its roles as arbiter of competing interests and balancer of new legal substance and ancient legal formalism.

As the century progressed, there was added to judicial thinking a growing apprehension of unchecked state power: progress was highly acceptable, but not at the expense of due process and a balancing of equities. The judiciary no doubt gladly legitimated the demands of expansive eminent domain law, but at the same time it began to conform this new area of law to the formalism of legal tradition. The courts looked less at the policies justifying eminent domain and more at the procedures used to effect a legally sanctioned taking of property. As a consequence, the judiciary could assume the role of impartiality which was traditionally expected of it. Ultimately, the judiciary acted not to promote a particular social philosophy but to preserve what it perceived to be the integrity of the legal process.

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